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In The

Supreme Court of the United States

October Term, 1974

No. 74-1603

MEYER GOLD,

Petitioner,

vs.

FANNY HANDEL and PREL CORPORATION,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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In The

Supreme Court of the United States

October Term, 1974

No.

MEYER GOLD,

Petitioner,

vs.

FANNY HANDEL and PREL CORPORATION,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, Meyer Gold petitions this Court for a writ of certiorari, to review the judgment of the United States Court of Appeals for the Second Circuit, entered March 27, 1975, and the order of the Court of Appeals, denying a petition for rehearing, dated April 16, 1975.

OPINIONS BELOW

The United States Court of Appeals affirmed the order of the District Court, without opinion (Appendix A, 1a).

The petition for rehearing was denied without opinion (Appendix C, 4a).

JURISDICTION

The jurisdiction of the Court to review the judgment of the Court of Appeals, is authorized by 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

This petition involves the right of a defendant in a civil case to due process of law as required by the Fifth Amendment to the United States Constitution.

ISSUES INVOLVED

1. Did the Court of Appeals err, contrary to the constitutional requirements of due process, when it failed to require the holding of evidentiary hearings to determine the truth of the matters and the issues of fact presented by the petitioner's moving affidavits on his motion to vacate a default judgment under Fed. R. Civ. Pro. 60(b)?

2. Was the petitioner deprived of his property without due process of law in having his answer stricken and a default judgment entered in the sum of $169,000 as a sanction under Fed. R. Civ. Pro. 37, when the sanction bore no reasonable relationship to the defendant's alleged failure to comply with discovery obligations?

3. Should a large default judgment be permitted to stand when the petitioner has made a prima facie showing of mistake or excusable neglect; has a substantial defense; and no prejudice will result to the other party by vacating the default judgment?

4. Was the respondent required, before obtaining a default judgment, to give personal notice to the petitioner when it was apparent that the petitioner's attorneys had ceased to appear and answer in his behalf?

PRELIMINARY STATEMENT

A default judgment for $169,000, was entered against Meyer Gold, pursuant to Fed. R. Civ. Pro. 37(d) for his failure to answer interrogatories. The default judgment was granted without a hearing, in the absence of opposing papers, and without personal notice to the petitioner at a time when it was apparent that his attorneys, without his knowledge had ceased to appear or answer in his behalf. The petitioner's motion to vacate the default judgment, pursuant to Fed. R. Civ. Pro. 60(b), was denied. The Court of Appeals affirmed the decision of the District Court, and denied the petition for rehearing both without opinion.

REASONS FOR GRANTING THE WRIT

I.

PETITIONER'S MOTION TO VACATE WAS DENIED WITHOUT AN EVIDENTIARY HEARING.

The Supreme Court has cautioned as to the "constitutional limitations upon the powers of courts . . . to dismiss an action without affording a party the opportunity for a hearing on the merits of his cause." *Society International etc. v. Rogers*, 357 U.S. 197, 209 (1958). The moving affidavits made a prima facie

showing as to the petitioner's good faith, mistake and excusable neglect. If such sworn statements are true, as we must assume they are, the Court of Appeals action in affirming the decision of the District Court plainly violated the petitioner's constitutional rights under *Rogers*. See *Dorsey v. Academy Moving & Storage, Inc.*, 423 F.2d 858 (5th Cir. 1970).

This same Court of Appeals just seven months prior required an evidentiary hearing.

> "This matter could not be determined on the basis of conflicting and competing affidavits. We are in no better or worse position than the District Court was in the absence of evidence which a hearing could produce to determine whether or not Koegel's claims were credible. This position is not sufficiently secure to support the drastic action taken. We are persuaded that the proper resolution is to reverse the order denying the Rule 60(b) motion and remand for an evidentiary hearing so that appropriate findings may be made consonant with the due process standards we have discussed." *Flaks v. Koegel*, 504 F.2d 702 (2nd Cir. 1974).

II.

ENTRY OF DEFAULT JUDGMENT OF $169,000 DEPRIVED PETITIONER OF PROPERTY WITHOUT DUE PROCESS OF LAW SINCE THE SANCTION IMPOSED BORE NO REASONABLE RELATIONSHIP TO THE PETITIONER'S ALLEGED FAILURE TO COMPLY WITH DISCOVERY OBLIGATIONS.

The 1970 amendments to Rule 37, were intended to authorize the Court, where it deemed appropriate, to impose more flexible and softer sanctions for Rule 37 violations, than theretofore provided. The dismissal of a pleading for the entry of default judgment is the most drastic sanction provided by the rule. Judge Sterry Waterman has commented:

> "If the cause has not gone to trial and it is before a Court of Appeals following an order of dismissal, or a contempt conviction, the reviewing court, before affirming the use of these drastic sanctions permissible under Rule 37, will scrutinize the situation out of which the sanction order arose. The contempt sanction, though wicked-sounding, is not nearly as drastic a sanction as dismissal. It only leads to a fine or a possible jail sentence — its use does not result in the termination of a litigant's cause of action."

The Court in *Societe Internationale v. Rogers,* 357 U.S. 197, 209 (1958), established constitutional limitations upon the power of the Courts even in aid of their own valid processes to

dismiss an action without affording a party the opportunity for hearing on the merits of his cause. Such is the case before this Court now. A default judgment was entered against the petitioner without the opportunity for a hearing on the merits of his cause, and a sanction which in effect imposed a penalty of $169,000 for his failure to answer interrogatories which penalty bore no reasonable relationship to his alleged failure to comply with the discovery obligations.

III.

THE RESPONDENT FAILED TO GIVE PERSONAL NOTICE TO THE PETITIONER PRIOR TO THE ENTRY OF DEFAULT JUDGMENT ALTHOUGH THE RESPONDENT WAS AWARE OF THE FACT THAT THE PETITIONER'S ATTORNEYS HAD CEASED TO APPEAR OR ANSWER IN HIS BEHALF.

The Court of Appeals rejected the petitioner's argument that the good faith and willfulness of the respondent must be closely examined in determining whether the default judgment should be permitted to stand. If either party took unfair advantage of the other the interest of justice would require that the default be vacated and a trial be held on the merits.

The Court of Appeals 2nd Circuit, in a 1971 decision held as follows:

> ". . . The procedure followed in the case of sending all notices, motions and orders to Ennis after it was known that he had disappeared seems

> to indicate a disposition to take refuge in the empty formality of fulfilling the letter of the legal requirements while disregarding realistic demands of the situation. Surely, once it became known that Ennis had disappeared notice of action proposed or taken should have been sent to plaintiff personally. In the absence of a court order, directing such service, the defendant's attorneys were at fault for failing to do what common sense required. In doing so they took unfair advantage of the plaintiff. *Vindigni v. Meyer*, 441 F.2d 376 (2nd Cir. 1971)."

The Courts universally favor trial on the merits. Any doubts about whether relief should be granted should be resolved in favor of setting aside the default so that the case may be heard on the merits. *Tolson v. Hodge*, 411 F.2d 123 (4th Cir. 1969). Even in a case where the plaintiff exhibited failure of good judgment and (the) conduct was an affront to the Court. *Peterson v. Term Taxi*, 429 F.2d 888 (2nd Cir. 1970).

The case at hand could clearly serve as a guideline for a problem which has long plagued the courts of our country; the entry of default judgments; when they may be vacated; when default judgments violate the constitutional requirements of due process of law; and when personal notice is required before entry of default judgment.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for the writ of certiorari should be granted.

Respectfully submitted,

s/ Irwin Lampert
Attorney for Petitioner

BLEED

APPENDIX A — ORDER OF DISTRICT COURT

DECISION OF KEVIN T. DUFFY, U.S. DISTRICT COURT JUDGE

The Motion to vacate the default judgment pursuant to Rule 60(b) FRCP; is denied. The persistence of the defendant in ignoring the orders of this court, directed both to him and to his attorneys, constituted a blatent disregard for the process of justice. While the size of the judgment is large, the record in this case demonstrates that the plaintiff established a prima facie case before Magistrate Jacobs and that the default was not due to mistake or excusable neglect.

So Ordered:

July 29, 1974

KEVIN T. DUFFY
U.S. District Court Judge

APPENDIX B — JUDGMENT OF UNITED STATES COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE

SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-fifth day of March, one thousand nine hundred and seventy-five.

Present:

HON. IRVING R. KAUFMAN
Chief Judge

HON. WILLIAM H. MULLIGAN
Circuit Judge

HON. ROSZEL C. THOMSEN
District Judge

Fanny Handel,

Plaintiff-Appellee,

v.

Meyer Gold and Prel Corporation,

Defendants

Appendix B

Meyer Gold,

Defendant-Appellant.

74-2295

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed with costs to be taxed against the appellant.

A. DANIEL FUSARO,
Clerk

By VINCENT A. CARLIN,
Chief Deputy Clerk

APPENDIX C — ORDER OF UNITED STATES COURT OF APPEALS DENYING PETITION FOR REHEARING

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the SIXTEENTH day of April, one thousand nine hundred and seventy-five.

Present:

HON. IRVING R. KAUFMAN,
Chief Judge,

HON. WILLIAM H. MULLIGAN,
Circuit Judge,

HON. ROSZEL C. THOMSEN,
District Judge.

FANNY HANDEL,

Plaintiff-Appellee,

v.

MEYER GOLD and PREL CORPORATION,

Defendants,

Appendix C

PREL CORPORATION,

Defendant-Appellee,

MEYER GOLD,

Defendant-Appellant.

74-2295

A petition for a rehearing having been filed herein by counsel for the appellant, Meyer Gold

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

s/ A. Daniel Fusaro
A. DANIEL FUSARO, CLERK